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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35305**

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**BNSF RAILWAY COMPANY'S REPLY TO  
ARKANSAS ELECTRIC COOPERATIVE CORPORATION'S  
PETITION FOR A STAY AND TO COAL SHIPPER  
ORGANIZATIONS' MOTION FOR A HOUSEKEEPING STAY**

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BNSF Railway Company ("BNSF"), the defendant in this declaratory order proceeding, hereby replies to the September 30, 2010 Petition of Arkansas Electric Cooperative Corporation ("AECC") for a Stay and the September 30, 2010 Motion for a Housekeeping Stay by Coal Shipper Organizations. AECC requests that the Board enjoin BNSF from enforcing the coal dust emissions standards that are the subject of this proceeding until the Board issues a decision on the merits of AECC's request for a declaratory order. Coal Shipper Organizations (a group consisting of Western Coal Traffic League, American Public Power Association, Edison Electric Institute, and National Rural Electric Cooperative Association) request that the Board enter a "housekeeping stay" and order that the effective date of BNSF's coal dust emissions standards be stayed pending further order of the Board.

Both requests should be denied. The injunctions sought by AECC and Coal Shipper Organizations are both unnecessary and inappropriate. The record in this proceeding has been closed for four months and a decision by the Board can be expected soon. While the Board completes its review of the record, BNSF intends to continue monitoring coal dust emissions and to engage in discussions with its shippers to ascertain what steps the shippers intend to take to comply with BNSF's coal dust emissions standards. But BNSF has not established any specific measures to enforce compliance with the challenged standards and BNSF has committed to

provide at least 60 days notice before applying enforcement measures against any common carrier shipper that is not in compliance with the challenged standards. Before BNSF takes specific enforcement steps, there will be ample opportunity for any affected shippers to seek the Board's intervention if they wish to do so. Under these circumstances, BNSF's coal shippers cannot demonstrate imminent and irreparable harm, which is a statutory requirement for an order enjoining conduct, like the adoption of the operating rules at issue here, that is authorized by the statute. 49 U.S.C. §721(b)(4).

Moreover, both petitions have serious legal defects. AECC is not even a coal shipper, but rather a part owner of facilities that receive coal from Union Pacific Railroad Company, so it has no standing to seek an injunction against the implementation of the coal dust emissions standards set out in BNSF's published operating rules. BNSF has no common carrier obligation to AECC and has no other legal or commercial obligation to AECC that could provide the basis for a claim for injunctive relief. Coal Shipper Organizations do not even attempt to satisfy the standards for obtaining a stay. They try to circumvent the requirements of 49 U.S.C. §721(b)(4) by calling the relief they seek a "housekeeping stay." But in fact they seek an order enjoining conduct that BNSF is authorized to undertake and they cannot avoid the statutory requirements for such an order through a semantic device.

## **I. BACKGROUND**

This proceeding involves operating rules established by BNSF that will curtail coal dust emissions from loaded coal trains operating in the Powder River Basin ("PRB"). The operating rules at issue are set out in Items 100 and 101 of BNSF's Coal Rule publication denominated as Price List 6041-B. The rules set out limits on the amount of coal dust that can be emitted from loaded coal trains passing specific monitoring locations.

AECC challenged those rules in a petition for declaratory order filed on October 2, 2009, seeking a declaration that the rules were unreasonable. AECC simultaneously filed a petition for a stay of the operating rules. In response, BNSF demonstrated that AECC did not have a valid legal basis for seeking a declaratory order or a stay relating to BNSF's coal dust emissions standards. Nevertheless, BNSF stated that it would be appropriate for the Board to examine the reasonableness of the challenged coal dust emissions standards. BNSF further stated that it would temporarily suspend the effective date of the challenged operating rules to give the Board an opportunity to carry out that review. AECC subsequently withdrew its stay petition.

As requested by BNSF and AECC, the Board initiated this proceeding and adopted an accelerated schedule for discovery and presentation of evidence and argument. The shipper members of Coal Shipper Organizations, as well as other interested parties, intervened in the proceeding. There was widespread participation in this proceeding from shippers, railroads and the Department of Transportation. The parties engaged in extensive discovery and filed evidence and argument over a three-month period. The record closed on June 4, 2010, and a hearing on the evidence was held on July 29, 2010. A decision by the Board can be expected soon.

Throughout this proceeding, BNSF has emphasized the urgency of the coal dust problem and the importance of curtailing coal dust emissions to ensure the safety and efficiency of a vital link in the U.S. energy supply chain. In contrast, the coal shippers deny the existence of a problem and seek to put off for as long as possible any responsibility for dealing with coal dust emissions. With their petitions for stay, AECC and the Coal Shipper Organizations seek further delay in addressing the effects of coal dust.

## **II. ARGUMENT**

### **A. AECC Has No Valid Grounds To Obtain An Injunction.**

The injunction sought by AECC is neither necessary nor appropriate. A year has passed since AECC initiated this proceeding and coal dust emissions continue to threaten the reliability of PRB rail lines. BNSF cannot afford to put on hold its efforts to deal with the coal dust problem. Indeed, while this proceeding has been pending, BNSF has devoted substantial resources to a large scale field test of surfactants and other coal dust curtailment technologies so that shippers will have the information necessary to implement effective curtailment measures. BNSF intends to follow up on these efforts by seeking information from its shippers about their plans to adopt measures that will enable them to comply with BNSF's coal dust emissions standards. BNSF also intends to continue monitoring coal dust emissions and providing its shippers with the results of that monitoring effort. But the emissions data for the month of October – the first month in which the standards will be in effect – will not even be available until well into November.

There is no need for the Board to take any action while it completes its review of the record. AECC asks the Board to enjoin BNSF's enforcement of the challenged coal dust emissions standards, but as BNSF has advised the Board, BNSF has not established any specific measures to enforce compliance with its coal dust emissions standards. BNSF has also committed to provide at least 60 days notice before undertaking enforcement measures against any common carrier shipper that is not in compliance with the standards. Before BNSF takes specific enforcement steps, there will be ample opportunity for any affected shippers to seek the Board's intervention if they wish to do so.

Moreover, there is no valid legal basis for the order sought by AECC. AECC acknowledges that its request for relief is subject to the requirements of 49 U.S.C. 721(b)(4).

The relief available under that statutory provision is extraordinary. *See Gen. Ry. Corp. d/b/a Iowa N.W.R.R. – Exemption for Acquisition of Line – In Osceola & Dickinson Counties*, STB Finance Docket No. 34867, 2007 WL 2022134, at \*1 (STB served July 13, 2007). Since Congress intended to provide railroads with the initiative to establish rates and rules applicable to the service they provide, a party seeking to enjoin railroad conduct while a challenge to that conduct is pursued must present a “strong case that an injunction is warranted.” *Seminole Elec. Coop., Inc. v. CSX Transp. Inc.*, STB Docket No. 42110, slip op. at 3 (STB served Dec. 22, 2008).

Injunctive relief is available only to “prevent irreparable harm.” 49 U.S.C. §721(b)(4). That irreparable harm must also be “actual and imminent.” *Tri-State Brick & Stone of New York, Inc., & Tri-State Transp., Inc. —Petition for Declaratory Order*, STB Finance 34824, 2008 WL 367670, at \*2 (served Feb. 12, 2008). Speculative allegations of possible future harm cannot support an injunction: “The party seeking a stay is required to demonstrate that the injury claimed is imminent, ‘certain and great.’” *Sault Ste. Marie Bridge Co.—Acquisition & Operation Exemption—Lines of Union Pac. R.R. Co.*, STB Finance Docket 33290, 1997 WL 26998, at \*5 (served Jan. 24, 1997) (quoting *Consolidated Rail Corp.—Abandonment—Between Corry & Meadville, in Erie & Crawford Counties, PA*, ICC Docket No. AB-167 (Sub-No. 1139) at 7 (ICC served Oct. 5, 1995) (internal citations omitted)).

AECC could not possibly meet this standard. As noted above, BNSF intends to continue monitoring coal dust emissions and to engage in discussions with its shippers to ascertain what steps they intend to take to comply with BNSF’s coal dust emissions standards, but BNSF has not established any specific measures to enforce compliance with its coal dust emissions standards and it has committed to provide at least 60 days notice before undertaking enforcement

measures against any common carrier shipper that is not in compliance with the standards.

Under these circumstances, there is no credible basis for a claim that any BNSF shipper will suffer “actual and imminent” harm if the challenged rules are allowed to go into effect while the Board completes its review of those rules. AECC cannot meet the threshold statutory requirement for obtaining the extraordinary relief it seeks.

AECC correctly points out that the party seeking to enjoin conduct that is alleged to be unlawful must also show a substantial likelihood of success on the merits of its underlying legal claim. It is unnecessary to address the “substantial likelihood” prong of the injunction test here since there is a large and fully developed record in this proceeding that specifically addresses AECC’s legal claims. BNSF is confident that the Board will find that BNSF is entitled to adopt operating rules like the rules at issue here that are intended to ensure the safe and efficient operation of a vital link in the U.S. energy supply chain, and that the emissions limits and monitoring procedures in those rules are a reasonable means of getting coal shippers and their mine agents to adopt coal dust curtailment measures that will effectively deal with the risk of service interruptions from coal dust fouling. The Board should give no weight to AECC’s ludicrous claims that coal dust is no worse than any other ballast fouling agent or that BNSF’s own operating practices are the cause of the coal dust problem in the PRB.

Nor can AECC satisfy the public interest prong of the injunction standard. It is clearly in the public interest that railroads and shippers continue to work toward eliminating coal dust emissions in the PRB. While the shippers have sought for years to put off any responsibility for the coal dust fouling caused by their coal escaping from loaded trains, the public interest is not advanced by further delays in addressing the coal dust problem. To the contrary, it is of critical

importance to the public that efforts continue to be made to ensure the safety and reliability of PRB transportation.

Finally, AECC lacks standing to seek an injunction against BNSF's enforcement of the coal dust emissions standards set out in operating rules that are applicable to BNSF's shippers. AECC is not even a shipper of PRB coal. It is a partial owner of coal-fired electric generating facilities that receive coal under transportation contracts with Union Pacific Railroad Company. *See Opening Evidence and Argument of Union Pacific Railroad Company at 17 (filed Mar. 16, 2010).* BNSF has no common carrier obligation to AECC and has no other legal or commercial obligation to AECC that could provide the basis for a claim for injunctive relief. On this basis alone, AECC's petition should be denied.

**B. The Coal Shipper Organizations' Motion for a Housekeeping Stay is an Invalid Attempt to Circumvent the Requirements of 49 U.S.C. § 721(b)(4).**

The Coal Shipper Organizations pursue a different approach from AECC. Rather than attempting to meet the demanding standards of the statute that governs injunctive relief, they ask the Board to pretend that the order they seek is just a "housekeeping stay" that can be entered without any showing of irreparable harm. But the Coal Shipper Organizations cannot circumvent the statute merely by calling the injunction they seek by a different name. Railroads undeniably have the right to establish operating rules without prior approval by the Board and the Board does not have the authority to suspend or enjoin those rules without a showing under 49 U.S.C. §721(b)(4).

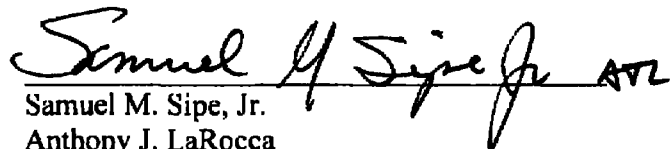
The cases cited by the Coal Shipper Organizations are inapposite. *Minnesota Power, Inc. v. Duluth, Missabe and Iron Range Ry.*, STB Docket No. 42038 at 2 (STB served Apr. 18, 2000), concerned the Board's decision to grant a "brief postponement" of a deadline established by its own previous decision so that the Board could consider issues raised in a petition for

reconsideration. In *ABC & D Recycling, Inc.—Lease and Operation Exemption—A Line of Railroad in Ware, Mass.*, STB Finance Docket No. 35397 (STB served Aug. 26, 2010), both parties had agreed that a stay was appropriate, and the only question involved the duration of the stay. Neither case cited by the Coal Shipper Organizations remotely suggests that a “housekeeping stay” is a permissible means to circumvent the requirements of 49 U.S.C. § 721(b)(4) and enjoin the implementation of a railroad’s operating rule. The Coal Shipper Organizations’ motion should be denied.

### III. CONCLUSION

For the reasons discussed above, the Board should deny AECC’s petition for a stay and the Coal Shipper Organizations’ motion for a housekeeping stay.

Respectfully submitted,



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October 7, 2010



**CERTIFICATE OF SERVICE**

I hereby certify that on this 7th day of October, 2010, I have served a copy of the foregoing BNSF Railway Company's Reply to Petition of Arkansas Electric Cooperative Corporation's Petition for a Stay and Coal Shipper Organizations' Motion for a Housekeeping Stay on the following by first class mail:

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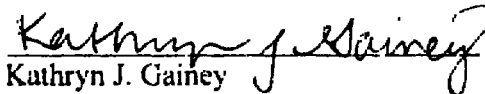
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